Wrong Way

Technology and people can crash during trials. How to recover from (and prevent) disasters.

By Robyn Weisman

None of the news reports about the Roger Clemens perjury trial mentioned anything about failed technology. The prosecution was able to play the videotape that showed U.S. Rep. Elijah Cummings reading an affidavit of Laura Pettitte, the wife of Clemens' former baseball teammate, Andy Pettitte, without a hitch.

The problem: Prosecutor Steven Durham had been told during motions *in limine* that Ms. Pettitte's testimony was hearsay and, therefore, inadmissible. As a result, U.S. District Judge Reggie Walton declared a mistrial; the retrial is set for April 17.

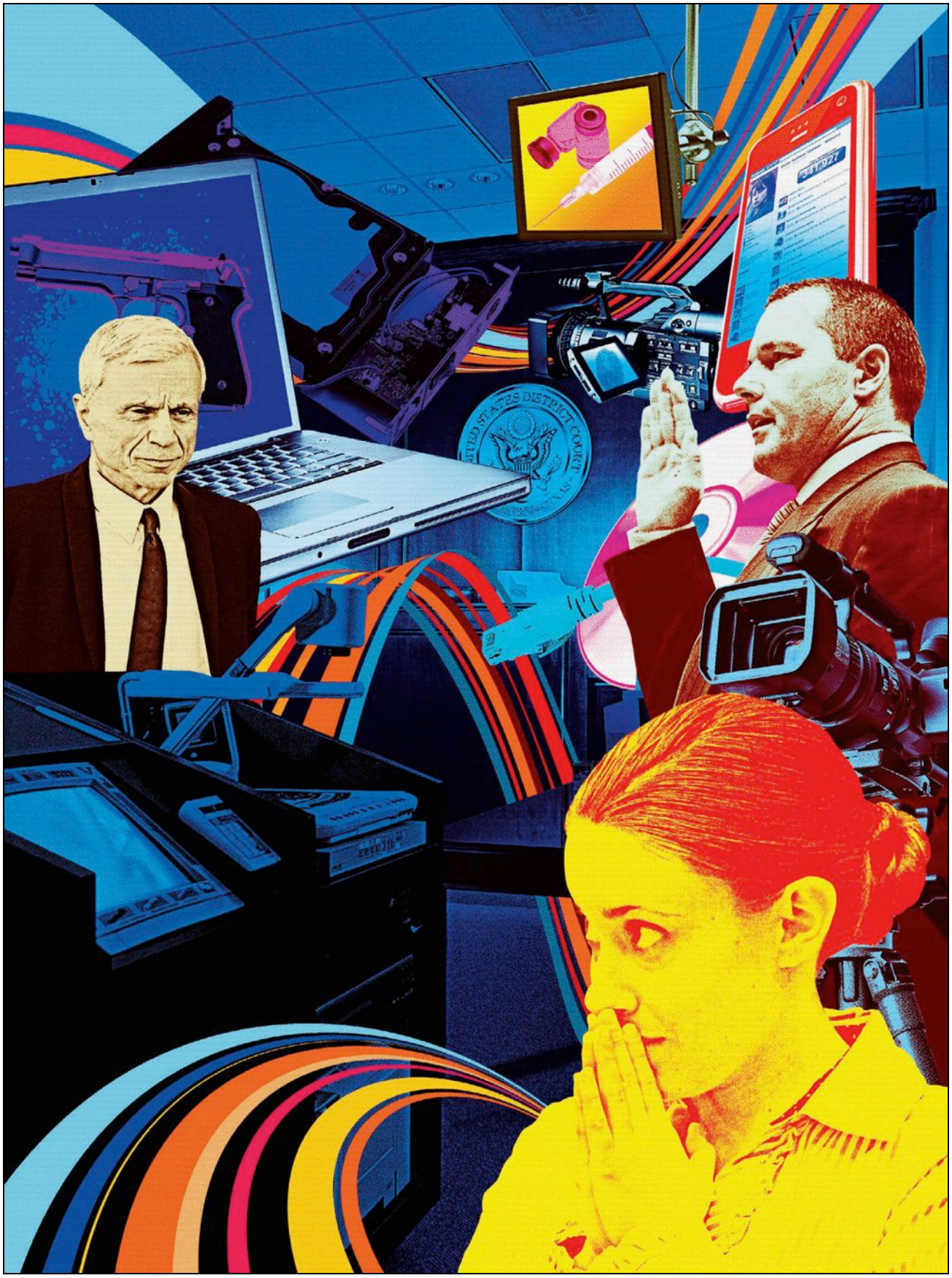
"Something like this should never happen," said SNR Denton partner Glenn Colton, who heads the firm's U.S. white collar and government investigations practice, in an interview with *The National Law Journal*. "In a high-profile case or not, prosecutors need to be vigilant, going over evidence to make sure it's proper and admissible."

Human and technological snafus are inevitable, say practitioners. "Murphy's Law is rule number one in technology," says J. Craig Williams, a partner at Sedgwick, based in its Orange County, Calif., office. He experienced a courtroom technology crisis when his only hard drive crashed during a preliminary hearing. "I lost all of my documents, and I didn't have paper copies because they would have filled up the courtroom," remembers Williams, a member of *LTN*'s Editorial Advisory Board. "Because I did not bring a backup hard drive or computer, the court had to suspend the proceedings for that day." He now brings the equivalent of "a mobile law firm" to every trial.

Fredric Lederer, chancellor professor of law and director of the Center for Legal and Court Technology and Legal Skills at William & Mary Law School, says there are three types of trial technology snafus: 1) real or perceived hardware failure, 2) real or perceived software failure, and 3) attorney ineptitude. Hardware failure is the least common cause of technology derailment — fried hard drives and light bulbs notwithstanding.

In contrast, software error is "almost guaranteed," says Lederer, also on *LTN*'s board. Microsoft's ubiquitous software seems to often trigger mishaps: "Every reader understands that Windows periodically screws up." For example, "imagine you're doing an opening statement, and you're accessing images on your computer — when all of a sudden Windows goes into an update, [which] can take awhile."

ILLUSTRATION BY **SEAN MCCABE**


UNITED STATES DISTRICT COURT

Sometimes, trial teams alienate jurors by poorly using software that is working perfectly. Williams recalls a trial where opposing counsel used a PowerPoint presentation that was 146 slides and 2½ hours long: "Nobody paid attention to it."

Lack of communication within the trial team also can generate a plethora of technology-related problems, says Williams, who once attended an arbitration where opposing counsel's technologist pulled up a document and put it on the screen. "I hadn't seen it before, and it was a smoking gun. I was able to get it produced and entered into evidence. The attorney got sanctioned for it, [which] really hurt his case."

Litigators can severely damage cases by misinterpreting data generated by trial technology. During the Florida trial of Casey Anthony, accused of murdering her 2-year-old daughter Caylee by dosing her with chloroform and suffocating her with duct tape, prosecutors put forth evidence that the defendant had searched the web 84 times for information on chloroform.

At issue was the prosecution's use of SiQuest's Cacheback software to retrieve web browsing history files from unallocated space on Anthony's household computer. "Aside from the problem of proving that it was Casey Anthony at the computer conducting the searches, the prosecution failed to translate the technological findings in a manner that might sway a jury," observed *LTN* associate editor Michael Roach in an *LTN* commentary (bit.ly/LTN1110r). He cited blog posts from Keith Jones criticizing "testimony from SiQuest CEO John Bradley that was far from user-friendly, and mired in jargon, such as 'primary key database value,' 'houses the decoded results,' 'Universal Resource Locator,' or 'web address which relates to the record entry.' " Observed Roach: "Jones demonstrates how a simple PowerPoint slide presentation detailing what a Google search for what 'neck breaking' looks like might have much more easily held the jury's interest."

Amy Singer, president of Florida's Trial Consultants, says social media was key to winning the Anthony case. Hired by the defense, her team sampled bloggers and discussion groups that were monitoring the trial, and concluded that the more computer-savvy observers shared a general consensus that there was no way Anthony searched for chloroform 84 times."[She] searched for chloroform once, and not even how to make chloroform, but 'What is chloroform?' " says Singer.

During the trial, her team monitored a wide range of social media, including Twitter, Facebook, blogs, chat and discussion rooms — analyzing about 1 million comments daily. "Social media made a huge difference," she says. "It drove the demonstrative evidence. It drove the court's examination." For example, as inconsistencies occured with testimony from and about Casey's father, "we knew how to hit hard," she explains.

In essense, Singer's team used social media the same way some litigators use a shadow jury — to monitor emotional responses to trial stimuli and provide immediate feedback on testimony, says Christine Martin, a New York-based jury and

Controlling skids takes practice and luck

IT'S INEVITABLE: You will experience trial technology failure at some point during your career. But just as you can sometimes control a skid (with preparation and a dash of luck), you can keep your presentation on path with effective steering. Some driving tips:

1. Assume that you and your team are at fault: "Lawyers have a tendency to blame the courtroom when something doesn't work," says Fredric Lederer. He recalls a trial where a litigator could not get a video to run, and implicated the courtroom.

"The bailiff walks over to the attorney, hits two keys to toggle the video out of the computer into the courtroom system, and smiles broadly when [the video] comes up instantaneously," Lederer says. The bailiff got cheers. The lawyer lost credibility.

2. Know your judge and jury: Attorney J. Craig Williams recommends talking to the judge before the trial starts, to assess his or her technology comfort level. "There is no sense in walking into the courtroom and have the judge say, 'You're not using that here.' Then you've spent tens of thousands of dollars on all this technology you can't use."

"Humor, especially self-deprecating humor, works when it works. When it doesn't, it's awful," says U.S. Magistrate Judge Andrew Peck. Mistakes can alienate both the judge and jury, especially if they interpret the snafu as evidence a lawyer is not prepared. Then, "the jury feels their time is being wasted," says Peck.

Judges may be more understanding, "although the degree may be buffered by the amount of goodwill you've built prior to the failure. If it's the same lawyer who has missed two court conferences, has regularly been 15-20 minutes late every day, they'll probably have a lot less in the favor bank from the court than the lawyer who is always prepared, on-time, and courteous."

3. Don't be afraid to show your vulnerability: Robert Owen, a partner at Sutherland Asbill & Brennan, says that mistakes often can be opportunities to show the jury that you are human. "While you want the jury to see you as someone in whom they can entrust their loyalties, no one is perfect, and mistakes happen," says Owen. When mistakes occur, "be natural, own it, correct it, and move on in a brisk professional way," says Owen. "Handle it gracefully, and you're fine."

4. Be professional — and flexible: John Cleaves, supervisor of trial technology consulting at Latham & Watkins, quelled a litigation-support disaster with a mixture of competence, grace, and humor.

A client called demanding that Cleaves fire a freelance technologist because he had forgotten to kill the electronic feed for his solitaire card game, which showed up on the judge's monitor.

"The judge showed the game in progress and said, 'I don't know who is playing solitaire during this trial, but it needs to stop now. Not only that, but whoever it is, they are really bad at the game.' "

"'So he didn't get the whole red king, black queen, red jack thing?' " I asked the attorney, and he smirked," Cleaves recalled.

Then Cleaves resolved the problem by taking over the technology for the remainder of the trial.

social media consultant. When people reacted negatively to witnesses, the defense team could tailor its strategy, she said.

"It's hard to know to what degree social media swayed the jury, as opposed to lack of evidence from the prosecution or the color of the suit the prosecutor was wearing, but [this case] definitely put social media on the map — and it will be an important piece in trials going forward," says Martin.

Florida's Legal Graphicworks provided exhibit support for the defense. Vice president Tyler Benson says the case was so information-intensive that he and president Jim Lucas created timelines on seven-foot-long boards to help Anthony's lawyer, Jose Baez, discuss chronology with the jury.

The worst situation he and Lucas experienced happened in another case, when they inadvertently ran two versions of inData's TrialDirector. "One of the computers we were going to use that day was acting a little erratically, and our backup computer was using the older version of the software, which didn't support the video formats we were using to play back some deposition footage," Benson recalls.

During a 15-minute break, they ran a test but still couldn't get the video to play. They ultimately discovered that the older version ran on a 32-bit platform, not the 64-bit platform of the upgrade. They solved the crisis by reverting to the older version using a backup computer. Once back in their offices, they made adjustments so the new iteration worked properly on their computers. "That was a nail-biter to say the least — until we figured out what the problem was," Benson says.

Attorney David Sparks, of California's George & Shields, recalls a case where he had visited the courthouse ahead of the trial to test his technology, and everything had worked perfectly. But once in the courtroom, when he clicked on his remote, nothing happened. "The way I had stuck my remote in my bag [caused] it to push on the button that handles the laser, so it had drained out the batteries," he recalls. "The slide didn't advance, and I looked like a dork."

Sparks' response to the snafu? "I pretended like there was nothing wrong. I just walked over to the podium, started tapping the spacebar [on my Mac], and went through the presentation." Today, he carries extra batteries in addition to all the other backup equipment he had at the ready.

In today's environment of smartphones, YouTube, and Twitter, *not* using technology may be worse than making a mistake with those technologies. But some attorneys still worry that courtroom technology might alienate jurors.

That was the case when M. Gerald Schwartzbach took over the defense of Robert Blake in 2004, when the actor was charged with murdering his wife. A jury consultant had recommended a trial technologist, but Schwartzbach had reservations.

"I was concerned about the perception that we would be using fancy gadgets to buy [Blake's] way out of the case," recalls Schwartzbach, who practices in Mill Valley, Calif.

Moreover, Schwartzbach was scrambling to get ready for a trial date that had been set before he had taken over the case — and he had never, up to this point, used technology in trial.

The jury consultant recommended California-based Litigation-Tech. CEO Ted Brooks (a member of *LTN*'s board) demonstrated how trial technology could enhance a presentation, persuading Schwartzbach to give it a shot.

The team created two databases in Summation (now owned by AccessData) — one for documents and the other for photos. Then they used LexisNexis' LoadFile Pro to convert the two Summation databases into one database within TrialDirector — to hold everything from pretrial documents to Blake's "20/20" interview with journalist Barbara Walters.

"The most significant part of our defense had to do with gunshot residue tests, which could have been really boring," recalls Schwartzbach. "But we were able [to show] what the testimony really meant by putting it in lay language and showing photographs and graphs. It made the testimony more interesting and kept jurors from falling asleep."

Apparently the jury listened — after the "not guilty" verdict was announced, the foreman told reporters that they couldn't put the gun in Blake's hands. Says Schwartzbach: "The foreman was talking about the gunshot residue."

Periodically Schwartzbach meets potential clients who insinuate that Blake was guilty — and because Schwartzbach got him acquitted, that their case will be a piece of cake in comparison.

"I have to make sure they understand I am a lawyer," he says, "not a magician."

Robyn Weisman (e-mail: robyn@robynweisman.com) is a freelance reporter, based in Los Angeles.

Who should handle **the technology?**

Who should be in charge of overseeing your trial technology? Ultimately, the decision will depend on the complexity of the trial and of the technology, and the attorneys' comfort in using the technology. Tips from our experts:

IF POSSIBLE, lawyers should handle the technology personally, "because you can change your presentation on the fly and don't have any problems coordinating with whoever is assisting you," says Fredric Lederer.

DAVID SPARKS manages his own technology. "I like going to trial and having three or four attorneys on the other side and then having just me on my side with my Mac," he says.

CRAIG WILLIAMS recommends having a trusted associate or paralegal, who is extremely familiar with both your case and the technology being used. "Don't ever try to do an examination or an opening and closing statement and run the technology at the same time."

Be prepared

BACK-UP, BACK-UP, BACK-UP: computers, software, e-data, and even basic hardware.

CHECKLISTS: List every item you could possibly need, then have a colleague double-check the roster.

PRACTICE MAKES PERFECT: Visit your courtroom at least a week before the trial date. Rehearse using the technology you plan to use.

BE NOT AFRAID: If, despite all your preparation, something malfunctions, take a deep breath. Juries and judges are more likely to give you wiggle room when you're calm — and you'll be able to fix the problem more quickly if your emotions are under control. They might even empathize!